No. 11535

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

J. W. VAN METER, B. B. GRANNING and J. D. M. TREECE,

Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY of Philadelphia, Pennsylvania, a corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

APPELLANT'S OPENING BRIEF

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JURISDICTION

This action was initially brought by appellants, residents of Washington and Oregon, against Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation organized under the laws of the State of Pennsylvania, and Abe Goldman

and Morton Pinch, residents of Washington, in the Superior Court for the State of Washington in King County. (Tr. 2-10). Appellee insurance company filed a petition for removal (Tr. 24-31) and by order (Tr. 32-33) of said Superior Court, the action was removed to the United States District Court for the Western District of Washington. Removal was petitioned for and granted on the grounds that Abe Goldman and Morton Pinch were not necessary or proper parties and that the action was a separable controversy between residents of different states and that the amount in controversy exceeded the sum of $3,000.00. (Tr. 24-33). Defendants, Abe Goldman and Morton Pinch, were later dismissed upon motion. (Tr. 43-44). The United States District Court has jurisdiction under Sections 41(1) and 71 of Title 28 USCA. This appeal is taken under Section 128(a) of the United States Judicial Code, (28 USCA 225 (a)) from judgment of dismissal (Tr. 45).

STATEMENT OF CASE

Appellants are bringing this action on a fire insurance policy issued by the appellee company. It is admitted that the policy (Tr. 10-23) attached to the complaint was issued and that the tractor covered thereby was damaged by fire on or about October 3, 1945, within the period covered by the policy. At the time the policy was issued, the equipment was located in the State of Washington. The fire occurred while the tractor was located in California.

The policy contained a provision purporting to insure the property only while located in Washington. Appellants seek first a reformation and recovery on the policy on the ground that the provision purporting to insure the property only while in the State of Washington was inserted contrary to the understanding and agreement of the appellant, Van Meter, and appellee's agent; secondly, recovery on the policy on the ground that the appellee had waived or was estopped to rely on this provision, and, with knowledge of the fact that the property had been moved out of the State, elected to treat the insurance as being in effect.

Appellants made timely demand for a jury trial (Tr. 41) but upon motion the demand was stricken and the case was tried before the Court without a jury. At the conclusion of the appellants' case, the appellee moved to dismiss on the ground that the evidence failed to show a right of recovery against the appellee. (Tr. 151). The Court granted the motion and entered judgment of dismissal. (Tr. 45).

The following are the salient facts either admitted by the pleadings or developed by the appellants' testimony.

The appellant, J. W. Van Meter, was on November 10,1944, and for some time prior thereto engaged in the logging and trucking business. (Tr. 79). Lipman & Esfeld was a partnership, consisting at that time of Abe Goldman and Morton Pinch, engaged

in the insurance business and the American Discount Corporation was a loan company engaged in the business of lending money on securities. Both the firms, Lipman & Esfeld and American Discount Corporation, occupied the same office on the second floor of the Smith Tower Building, Seattle, Washington. (Tr. 80). For about five (5) years prior to the trial, appellant, J. W. Van Meter, had done business with these firms through Sol Esfeld, (Tr. 79-80), and generally when obtaining loans, the insurance was written by Lipman & Esfeld. (Tr. 81-82). Prior to April, 1944, Sol Esfeld had been the sole owner of Lipman & Esfeld (Tr. 145) and the appellant, J. W. Van Meter, had been issued policies by Lipman & Esfeld, signed by Sol Esfeld, (Tr. 80) but at no time prior to the loss in October, 1945, did he know of any change in the status of the ownership of Lipman & Esfeld. (Tr. 102).

Early in November, 1944, appellant, Van Meter, bought a tractor and logging arch and went to the office of the American Discount Corporation and Lipman & Esfeld to arrange to finance the purchase. (Tr. 81). At that time, he arranged with Sol Esfeld concerning insurance. Appellant, Van Meter, explained to Esfeld what risks he wanted covered (Tr. 82, 83, 115, 116), and Esfeld explained the different types of policies and reference was made to a marine policy that was good any place in any state, (Tr. 82-83) and it was this type of policy that Esfeld

agreed to have issued (Tr. 83, 116, 117). Sol Esfeld knew at that time that there was some likelihood that appellant, Van Meter, would move to Oregon. (Tr. 86, 118).

The testimony of Morton Pinch shows, that to the best of his recollection, Mr. Esfeld gave the data relative to this order for insurance to one of the employees of Lipman & Esfeld, and the policy, copy of which is attached to Complaint was thereafter issued, (Tr. 141-143), and turned over to the American Discount Corporation. The appellant, Van Meter, never actually saw the policy until after the fire in October, 1945. (Tr. 84, 103).

In March and April of 1945, appellant, Van Meter, again contacted Sol Esfeld at this office about financing a new truck, (Tr. 86-87), at which time he informed Mr. Esfeld that he had a logging job at Wallowa, Oregon. (Tr. 87). Esfeld was not willing to loan the additional money and suggested that Van Meter refinance in Oregon. (Tr. 87). At that time, Van Meter talked with Abe Goldman, one of the partners of Lipman & Esfeld, concerning his job in Oregon. (Tr. 89). Shortly thereafter, Van Meter arranged his financing with a Portland, Oregon firm and paid off his loan with the American Discount Corporation and moved his equipment to Oregon. (Tr. 87-88).

Defendant's Exhibit A-2 (Tr. 62-64) is a letter from Granning & Treece of Portland, Oregon, trans-

mitting a check to pay off the loan of the American Discount Corporation. Accompanying this letter was an authorization signed by appellant, J. W. Van Meter, directing the forwarding of the insurance policy and other papers to Granning & Treece stating: "If I am entitled to any refund for unearned interest or insurance premium, you may also return that direct to Granning & Treece." (Tr. 64).

Following this, there were various letters passing among Lipman & Esfeld and Granning & Treece and J. W. Van Meter which for purpose of clarity should be considered in the following order:

Plaintiffs' Exhibit 16 (Tr. 58, 59) is a letter dated May 4, 1945, from Granning & Treece to Lipman & Esfeld requesting a loss payable clause on Policy No. 906675 (not involved in this action). Attached to this letter is another slip of paper requesting loss payable clause on Policy No. TR8629 (being the one sued on here).

Plaintiffs' Exhibit 3 (Tr. 47-50) is a letter from Lipman & Esfeld to Van Meter dated May 1, 1945 (this date of May 1, 1945 is obviously in error because it appears to have been written after receipt of Exhibit 16), calling Van Meter's attention to the request for "loss payable endorsement" and requesting payment of a balance of $204.86 as per statement enclosed.

Plaintiffs' Exhibit 4 (Tr. 50-51) is a letter dated May 14, 1945, written by appellant, Van Meter, to

Lipman & Esfeld from Wallowa, Oregon. In this letter, Van Meter refers to the expense of moving his equipment "over here."

Plaintiffs' Exhibit 15 (Tr. 55-57) is a letter dated May 18, 1945, from Lipman & Esfeld to Van Meter explaining how the balance of $204.86 claimed to be owing was arrived at. Accompanying this letter was a copy of a letter by Lipman & Esfeld to Granning & Treece in which reference is made to loss payable clauses being forwarded. (Exhibit 17).

Plaintiffs Exhibit 18 (Tr. 61) is a letter from Granning & Treece to Lipman & Esfeld dated May 19, 1945, acknowledging receipt of Lipman & Esfeld's letter of May 18, 1945, with loss payable clauses.

Plaintiffs' Exhibit 5 (Tr. 51-53) is a letter from Lipman & Esfeld to Van Meter dated August 17, 1945, in which the subject of insurance is discussed at some length.

Plaintiffs' Exhibit 13 (Tr. 53) is a telegram and Plaintiffs' Exhibit 14 (Tr. 54) is a letter written by Lipman & Esfeld concerning this insurance after the fire had occurred.

The fact that these letters were sent by the parties signing them and received by the parties to whom they were addressed, is established by the testimony of Van Meter, John Mullins and Morton Pinch.

In September of 1945, appellant, Van Meter,

moved down to Redding, California, and on the night of October 3, 1945, the tractor was seriously damaged by fire. (Tr. 95). The cost of repair, including Van Meter's own time and that of one of his employees, amounted to a total of $4550.07. (Tr. 97-99).

The first issue is whether appellants were entitled to a jury trial. The second issue before the Court is whether the admissions in the pleadings and the evidence entitles the appellants to recover on any theory. Appellants contend: (1) That the facts entitle them to a reformation of the policy as prayed for in the Complaint and recover thereon, and (2) That the facts show that the appellee through its agents waived the provision purporting to grant coverage only while the property was located in Washington, that it is estopped to rely on it, and that it elected to continue the insurance in force with knowledge of the facts.

SPECIFICATION OF ERRORS

1. The Court erred in denying appellants' request for jury trial and striking appellants' demand for jury trial.

2. The Court erred in finding that the appellants were not entitled to a reformation of the policy as prayed for in the Complaint.

3. The Court erred in finding that the appellants were not entitled to recover on the theory that the appellee, through its agents, had waived or was

estopped to rely on that provision in the policy purporting to limit coverage to the State of Washington.

4. The Court erred in concluding that the decisions of the Ninth Circuit Court of Appeals in the case of Fidelity Guaranty and Fire Corporation v. Bilquist, 99 Fed. 2nd 333, 108 Fed. 2nd 713 were decisive of the issues in this case.

5. The Court erred in dismissing the case at the close of the plaintiffs' case on defendants' motion challenging the sufficiency of the evidence.

6. The Court erred in denying appellants' motion for a new trial.

ARGUMENT

1. Appellants Entitled to Jury Trial:

If this action was one primarily and exclusively for reformation of the policy and recovery thereon as reformed, admittedly the appellants would not be entitled to a jury trial. However, the Complaint in Paragraph VI and VII alleges facts showing a subsequent waiver of the provision in the policy limiting coverage while the property was in the State of Washington. Appellants' demand for jury trial was predicated on the theory that irrespective of whether they could prove facts entitling them to a reformation of the policy, nevertheless, the Complaint tendered an issue over whether the appellee had waived the clause in question or was estopped to rely on it. These issues were issues on which

appellants were entitled to a trial by jury and if found in favor of the appellants would entitle them to recover irrespective of their being able to prove facts entitling them to a reformation of the policy.

While the principle of waiver, as applied in insurance law, is founded somewhat on the doctrine of equitable estoppel, there is a distinction between waiver and estoppel. The doctrines of waiver and estoppel have long since become a part of the common law and as such, the issues with respect thereto, are triable by a jury. For a discussion of this subject, reference is made to the following authority:

Vance on Insurance, Hornbrook Series (2nd Ed.) Pages 451-458.

While the statement is not made particularly with reference to whether a party is entitled to a jury trial, text writers have stated that the question of whether a waiver or estoppel is inferable from the facts, is a question of fact for the jury.

67 Corpus Juris 311

29 Amer. Jur. 1156

Under Rule No. 38 of the new Federal rules, it is stated that no waiver of jury trial results from the union of legal and equitable issues or causes of action.

3 Moore's Fed. Practice (1945 Pocket Supplement) Page 5, Page 21.

The inclusion in a Complaint of a fraudulent transfer cause of action would not deprive a party

of jury trial as to other causes of action of a legal nature.

Elkins vs. Noble, 1 Fed., Rules Dec. 357.

> "As it seems to the Court, whether the Complaint in this action is regarded as an action at law, with equitable relief incidentally prayed for, or whether the Complaint be considered as an action at law and a suit in equity joined, the parties are, as a matter of right, entitled to a trial by jury on all legal issues raised, if demand for a jury is made as the rules provide."

U. S. vs. Connolly, 3 Fed. Rules Dec. 417.

The question of whether an action involving facts similar to those present in this case is primarily a law action or an equitable action was considered by the Supreme Court of Washington. In that case the issue was over whether the insured could recover notwithstanding that the property at the time of the loss was located outside the trading limits specified in the policy. The Court held that the action was primarily one at law and that a jury trial was proper.

Reynolds v. Canton Insurance Office, 98 Wash. 425, 167 Pac. 1115.

In a later part of this brief, appellants will discuss more at length their contentions that they could recover on the theory of waiver or estoppel. These issues were tendered by the appellants' Complaint and if found in favor of appellants would have entitled them to recover irrespective of any right of reformation. It was error for the trial court to refuse appellants' request for a jury trial.

2. Facts Entitle Appellants to Reformation of Policy.

The agreement preceding the issuance of this insurance policy was between appellant, Van Meter, and one, Sol Esfeld. (Tr. 82, 83). While prior to April, 1944, Sol Esfeld had been the sole owner of the insurance firm of Lipman & Esfeld who were agents for the appellee, he had sold his interest in the firm to Morton Pinch and Abe Goldman some time in April of 1944. (Tr. 144, 145). However, Sol Esfeld as officer and manager of the American Discount Corporation, continued to occpy the same offices as Lipman & Esfeld and the new partners continued to use the old firm name, Lipman & Esfeld. Appellant, Van Meter, had no knowledge of any change in the status of ownership of the firm of Lipman & Esfeld prior to the fire. (Tr. 102). Further, it appears from Morton Pinch's testimony that in practice, Mr. Esfeld continued to arrange insurance commitments on behalf of Lipman & Esfeld. (Tr. 141-142, 147). Thus it appears that not only was Sol Esfeld an ostensible partner of the firm which bore his name, but that he had actual authority to arrange insurance commitments for Lipman & Esfeld and the companies for whom that firm was agent.

In the meeting in this office in early November, 1944, Esfeld explained the marine type of policy to Van Meter. It was explained that this policy was

good in any state and it was this type of policy which the firm of Lipman & Esfeld, acting through Sol Esfeld, agreed to have issued. On this point, reference is made to the testimony of Van Meter appearing at pages 82, 83, 115, 116, and 117 of the Transcript.

The form of the policy that was issued conformed to Van Meter's understanding of its terms. Under the heading CONDITIONS on the reverse side of the face of the policy we find at the very top of the page this clause:

> "1. TERRITORIAL LIMITS. This policy covers only within the limits of the United States and Canada."

This clause is the very first of the conditions and the words "Territorial Limits" are set out in big type. Nothing is said in connection with this clause that it might be otherwise limited.

In one of the riders attached to the policy, the clause relied upon by the appellee is inserted. This clause reads:

> "3. This insurance covers only within the limits of the States of Washington."

The significant thing about these two clauses is that the first one is printed and is included in all policies issued on this form, whereas, the name of the state or states to which the other clause might limit the coverage had to be typed in. The minds of the parties had met on the general form of the policy to be issued. If the coverage provided by

that form was to be limited in any way, the appellee would be justified in doing so only as a result of an agreement with the insured. It is clear from the testimony of the appellant, Van Meter, that there was no understanding that the broad territorial coverage contemplated by the form of the policy that was to be issued was to be in any way limited.

Mr. Pinch who signed the policy in question admitted that he was familiar with most of the printed provisions of this form of policy. (Tr. 137, 140). It is a reasonable inference that he was familiar with printed condition No. 1 on the reverse side of the form of the policy. He admitted that he was not aware of the presence in the policy of the other clause limiting coverage while in the State of Washington. (Tr. 139-140). If this agent then knew of the provision which defined the territorial limits as being the United States and Canada and was not aware of the typewritten provision purporting to limit coverage to the State of Washington, the obvious conclusion is that he intended to issue a policy covering the property anywhere in the United States.

The fact is, as the evidence shows, that this typewritten word "Washington" was inserted purely through inadvertance and contrary to the understanding and agreement of the parties.

The later actions of the parties point indelibly to

the fact that they both regarded the insurance in effect notwithstanding the property's location outside the state. After knowledge had been brought home to them by Van Meter's letter of May 14, 1945, appellants' exhibit 4 (Tr. 50-51) that the property was in Oregon, Lipman & Esfeld wrote demanding payment of the balance of the premium. They issued loss payable clause to Granning & Treece in Portland and wrote various other letters, the effect of which was to lead the appellant, Van Meter, to believe that the insurance was in effect. These later actions will be discussed more at length on the proposition that they constituted a waiver or an election. They, however, have a bearing on the issue of appellants' right to reformation because they show a consistent manifestation of an understanding by the appellee's agent, that the policy still covered the property notwithstanding its location outside of the State.

At no time prior to the loss did the appellant, Van Meter, see the policy. (Tr. 103). It was held until about April 20, 1945, in the office of the American Discount Corporation which office was also occupied by Lipman & Esfeld. The policy was sent to appellants, Granning and Treece, on or about that date where it was inspected by J. R. Mullins, one of the employees who failed to notice the clause limiting coverage to the State of Washington. (Tr. 126). Appellants Granning and Treece, were not the ap-

pellant, Van Meter's, agent. Furthermore, their failure to notice this provision or take exception to it is easily understandable when viewed in the light of the fact that they wrote a letter to Lipman & Esfeld, Appellants' Exhibit 4, stating that: "In order that we may be fully protected," please issue a loss payable endorsement. Furthermore, one casually reading the policy would most likely notice condition No. 1 at the top of the reverse side which specified that the policy covers within the limits of the United States and Canada.

Briefly reviewing the facts, we find the uncontradicted testimony of Van Meter that Esfeld, acting for Lipman & Esfeld, agreed to have issued a policy that was good in any state. The printed form of the policy that was issued provided coverage that was good anywhere in the United States and it was only by virtue of the insertion of typewritten matter in an inconspicuous place that the fact of the property's location in Washington was made a condition to the continuance of the coverage. The agent, Morton Pinch who signed the policy, admitted that he was not aware of the provision limiting the coverage of the policy only while the property was located in Washington. (Tr. 140). After knowledge of the removal of the property outside the State, the agents, Lipman & Esfeld, executed and sent loss payable clauses to the appellants, Granning and Treece, and had at least two ex-

changes of correspondence with appellant, Van Meter, in which not the slightest suggestion is made about protection not being in effect outside the State, but on the contrary the letters are couched in language leading Van Meter to believe that the coverage was in effect.

The facts speak for themselves and they admit of only one conclusion, namely, that when this insurance was ordered, it was agreed that this type of policy with its broad territorial coverage was to be issued and there was no agreement that its provisions were to be limited by any clause such as was inserted here. These facts entitle appellant to reformation.

> "Reformation of an insurance policy may be had, in general, where, by reason of fraud, inequitable conduct, or mutual mistake, the policy as written does not express the actual and real agreement of the parties. More particularly, if by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity so as to express the actual contract intended by the parties if the mistake is mutual or if there has been fraud or inequitable conduct by one of the parties to the contract."
>
> 29 Amer. Jur. 237.

The rules governing the reformation of written instruments are applicable to the reformation of an insurance policy.

> *Bjorklund v. Continental Casualty Company,* 161 Wash. 340, 297 Pac. 155.

Miller v. United Pacific Casualty Ins. Co., 187 Wash. 629, 60 Pac. (2) 614.

To entitle one to reformation, actual fraud on the part of the agent need not be shown, it is sufficient to prove by reasonably clear and convincing evidence that the contract as written did not conform to the understanding and intention of the parties.

Thompson v. Phoenix Insurance Co., 136 US 287, 34 L. Ed. 408, 10 Sup. Ct. 1019.

Day v. Fireman's Fund Insurance Company, 67 Fed. (2nd) 257 (Fifth CCA).

Home Insurance Company v. Sullivan Machinery Company, 64 Fed. (2nd) 774 (10 CCA).

Springfield Fire and Marine Insurance Co. v. Martin, 77 Fed. (2nd) 492.

Appellants' understanding of the theory on which the trial court sustained the appellee's challenge to the sufficiency of the evidence was that the insured was absolutely chargeable with knowledge of the terms of the policy having in mind particularly the decision of this court in the case of *Fidelity and Guaranty Fire Corporation v. Bilquist,* 99 Fed. (2) 333, 108 Fed. (2nd) 713 and because of that fact, reformation and recovery on the policy must be denied. In a later section of this brief, the above mentioned case will be discussed at greater length. For the present, the attention of the Court is invited to certain other authorities.

In an early case in Washington involving an action on a fire insurance policy, the Washington Supreme Court held that an insured, who signed an

application which contained a clause limiting the authority of an insurance agent in respect to statements not contained in the application, was not chargeable with knowledge of the limitations where it was printed in small type.

Foster v. Pioneer Mutual Insurance Co., 37 Wash. 288, 79 Pac. 798.

The following statement from American Jurisprudence represents a fair statement of the rule on this question:

> ""The decisions are not in entire harmony upon the question of the right to reformation where the insured has retained a fire insurance policy without objection to its provisions, and has failed to examine its contents to ascertain whether or not it conforms with the contract agreed upon, although the facts of the cases largely determine the question. The greater number of cases, however, have held, under the facts involved, that the receipt and retention of a fire insurance policy without an examination to ascertain whether or not it conformed with the application made does not defeat the insured's right to a reformation. This result is reached in recognition of the fact that policies of fire insurance are rarely examined by the insured and even where examined are not always enlightening to him, due to the technical and complicated language in which the contract is usually couched. Another practical factor considered in reaching such a result is that the applicant usually tells the insurer's agent of his coverage necessities and relies on the agent for a policy in accordance therewith. For these reasons, most courts do not demand the same degree of vigilance and critical examination of fire insurance policies as would be expected of some other instruments."

29 Amer. Jur. Sec. 253, P. 244.

"Whether the failure of insured to read and examine the policy is such negligence on his part as defeats his right to a reformation depends on the facts and circumstances, it being sometimes held that there is negligence, but more often that there is not, at least where such failure is not prejudicial to insurer."

44 C. J. S. 1115.

The decisions on this question are numerous, including a number by the various Federal Circuit Courts of Appeal:

Ohio Casualty Ins. Co. v. Callaway, (10th Cir.) 134 F (2) 788;

Kansas City Life Ins. Co. v. Cox, (6th Cir.) 104 F (2) 321;

Liverpool & London & Globe Ins. Co. v. Crosby, (6th Cir.) 83 F (2) 647;

National Reserve Ins. Co. of Illinois v. Scudder, (8th Cir.) 71 F (2) 884, 886;

Home Ins. Co. of New York v. Sullivan Machinery Co., (10th Cir.) 64 F (2) 765;

Carson v. Home Fire & Marine Ins. Co., (5th Cir.) 39 F (2) 50.

The foregoing authorities are to the effect that even where the insured has received the policy and had possession of it, he is not precluded from obtaining reformation. In this case, the appellant, Van Meter, never say the policy. The case is much stronger than where the insured has actually seen and had an opportunity to examine the policy. The logical result of the trial court's view on the matter, is that under no circumstances would reformation

be possible because the knowledge imputed to the insured would be a complete bar to any suit for reformation. Obviously, such is not the law. The books are replete with cases where reformation has been granted.

Each case must be considered on its own facts. In this case, in view of the prominence given the clause that the policy covers within the limits of the United States and Canada as compared to the lack of prominence given to the other clause limiting the insurance to the State of Washington, it would be easily possible for a casual reader of the policy to conclude that the policy was good any where in the United States. A study of the cases on this point should convince one that even if the policy had been delivered to Van Meter and he had inspected it, his failure to have noticed the provision purporting to insure only while in the State of Washington would not preclude his right to reformation.

Appellants submit that the evidence clearly entitles them to reformation and recovery on the policy.

3. Appellants Are Entitled To Recover On Theory of Waiver or Estoppel.

The first question to be considered is whether the provision limiting coverage can be the subject of estoppel or waiver or must appellants' right to recover be predicated exclusively on its ability to prove its right to reformation. A consideration of

the decisions of the supreme Court of Washington and other jurisdictions fully support the appellants' position that this clause in this particular situation may be the subject of estoppel or implied waiver.

In considering this point, it should be born in mind that the provisions of the printed policy provided coverage anywhere in the United States or Canada. The other clause limiting coverage while the property was located in Washington, was only a condition purporting to modify the general scope of the form of policy used.

In a Washington Supreme Court case on this point, *Reynolds v. Canton Insurance Office,* 98 Wash. 425, 167 Pac. 1115, the plaintiff had applied for a fire insurance policy on a boat operating between Seattle and Alaska. The application requested that the policy should show that the boat would sail between Seattle and certain points in Alaska, The policy as issued, contained a warranty that during the "currency" of the policy, it would be employed only in certain waters. The fire occurred beyond the trading limits specified in the policy. The case was tried before a jury and from a judgment in favor of the plaintiff, the insurance company appealed. In deciding the case the Supreme Court of Washington said:

> "If the appellant or its agent, as the jury found, knew at the time the policy was issued, that the ARNOLD, upon the voyage contemplated, was to go beyond the trading limits prescribed in

> the marginal clause, and if the respondents had not consented to such clause, and had no knowledge thereof until subsequent to the fire, then the respondents would be entitled to prevail without a reformation of the policy, upon the theory that the appellant was estopped from asserting the provisions of the policy defining the trading limits to be other than those specified in the application." (98 Wash. 430).

In the case of *Henslin v. U. S. Fire Insurance Company,* 152 Wash. 637, 278 Pac. 702, the Supreme Court of the State of Washington had occasion to consider whether there could be a waiver of a provision in the policy providing that the property would be insured only while located at a certain place. In prefacing its discussion of the facts in that case, the Supreme Court of the State of Washington said:

> "We are not inclined to disagree with the authorities holding that an insurer may be precluded by estoppel from asserting conditions of an insurance policy. Assuming there may be a waiver of the conditions against the removal of insured goods to a new location, what were the acts of respondent upon which appellant rely as raising an implied waiver or estoppel?" (152 Wash. 639).

The Court then goes on to review the evidence and concludes that there was neither evidence nor reasonable inference from the evidence that insurance company's agent ever knew that the appellant had moved the goods.

The two cases cited above clearly establish the proposition that under the decisions of the Supreme

Court of the State of Washington, a provision providing that insurance attaches only while the property is located at a certain place may be waived or the insurance company may be estopped to rely on it.

It is a general rule that conditions in a policy of insurance relating to location of the property may be waived.

26 C. J. 281

45 C. J. S. 619.

Couch on his work on Insurance has the following to say on this subject:

> "Furthermore, the insurer may waive any breach arising from a removal of insured property from the place or locality described in the policy, either directly or through an authorized agent. Thus, an insurer waives the right to avoid a policy for removal of the goods to a new location after partial destruction, where, with knowledge of such removal, duplicate receipts for the partial loss are executed, in which it is recited that the policy is reduced by the amount acknowledged. And the insurer may be so far charged with notice and knowledge on the part of its agent as to preclude it, by waiver or estoppel, from setting up removal as a defense to an action to recover for loss. To illustrate: Under a provision insuring property only while it remains in the premises where it was when insured, the insurer waives its right to refuse payment on the ground of removal, where it fails to cancel the policy and return the premium on learning the facts, or where, after knowing the facts, its agent or representative induces the insured to incur trouble or expense in order to comply with any provisions of the policy. And a change of location is

> waived by the receipt by an agent of the premium, with knowledge of such change."
>
> 3 Couch Cyclopedia of Insurance Law, Page 2445.

In a Texas case, *Yeager v. St. Paul Fire & Marine Ins. Co.* Tex. 166 S. W. (2) 939, a policy of insurance was issued covering the plaintiff's dwelling and household goods. The policy contained a provision purporting to limit insurance on the household goods while located at the address of the dwelling. The plaintiff later sold the dwelling and moved the household goods to some other location. He called at the agents office advising of his sale and executed an assignment assigning the policy to the new owner of the dwelling. Insurance covering the household goods was also inadvertently included in the assignment. The household goods were destroyed by fire at their new location. In an action on the policy the court permitted a reformation of the assignment and held that the provision in the policy relating to location had been waived. In the course of its opinion the court said:

> "While the removal of personal property from the location in which it is insured ordinarily constitutes a breach of conditions contained in a Texas Standard Fire Policy so as to avoid the same, it is settled that such provision, as well as those relating to the timely furnishing of a sworn proof of loss, may be waived and the insurer may be estopped from asserting or relying upon the breach of such conditions or promises as a defense."

Yeager v. St. Paul Fire & M. Ins. Co. Tex. 166 S. W. (2) 939, 941.

The decision of the Washington Supreme Court in the case of *Carew, Shaw & Bernascoin Inc. v. General Casualty Co.,* 189 Wash. 329, 65 Pac. (2) 689, is not in conflict with the rule announced by the above authorities. That was a case involving insurance against loss of property by burglary while located in a safe. In disposing of the case the Court said:

> "The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel." (189 Wash. 336).

The appellants have no quarrel with this statement when considered in the light of the facts in that case. However, in that case the location of the valuables protected by the burglary insurance was the very essence of the contract. In this case, it is apparent that the exact location has very little to do with the risk and there is no suggestion that the rate or premium was in any sense predicated on the property necessarily being located in Washington. Having in mind the decisions of the Washington Supreme Court in the case of *Reynolds v. Canton Insurance Company,* 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Ins. Co.,* 152 Wash. 637, 278 Pac. 702, cited above, there is no warrant

for concluding that the rule in Washington as to the applicability of the rules of waiver and estoppel to a situation such as we have involved here is any different than in other jurisdictions. The decisions of the Supreme Court of the State of Washington in the case of *Reynolds v. Canton Insurance Company* and *Henslin v. U. S. Fire Ins. Co.* supra, clearly establishes that a condition relating to location of the property which does not go to the essence of the risk may be waived.

It is likewise the established rule in Washington that the knowledge and acts of the agents of the insurance company are imputable to the company.

Workman v. Royal Exchange Assurance, 96 Wash. 559, 165 Pac. 488;

Staats v. Pioneer Ins. Association, 55 Wash. 51, 104 Pac. 185;

Gaskill v. Northern Assurance Co., 73 Wash. 668, 132 Pac. 643;

Miller v. United Pac. Casualty Ins. Co., 187 Wash. 629, 60 Pac. (2) 714;

Turner v. American Casualty Company, 69 Wash. 154, 124 Pac. 486;

Stebbins v. Westchester Fire Ins. Co., 115 Wash. 623, 197 Pac. 913;

Harper v. Fireman Fund Insurance Co., 154 Wash. 77, 280 Pac. 743.

The facts developed in this case show a clear intention on the part of the insurance company acting by its agent to waive this clause and treat the coverage as still being in effect.

Before moving to Oregon, appellant, Van Meter, discussed his planned move with Sol Esfeld who, as far as the appellant knew, was a member of the firm of Lipman & Esfeld who were the appellee's agents. He also, in discussion with Abe Goldman, one of the members of the firm of Lipman & Esfeld, told of his contemplated move to Oeegon. Finally, if any doubt as to the fact that members of the firm of Lipman & Esfeld had any knowledge of the appellant's, Van Meter, move to Oregon, reference is made to a letter dated May 10, 1945, Pl. Exhibit 4 (Tr. 50-51), which on its face shows that it was written from Wallowa, Oregon. In this letter, Van Meter refers to the heavy expense of moving down there.

In a letter dated May 4, 1945, Pl. Exhibit 16 (Tr. 58-59), Granning & Treece wrote Lipman & Esfeld requesting loss payable clauses on two policies, one of which is the one sued on. In a letter to Van Meter following receipt of Pl. Exhibit 16, Lipman & Esfeld asked him to pay a balance owing of $204.86 on the premium and sent a bill, Pl. Exhibit 3 (Tr. 47-50). On receipt of a letter back from Van Meter, Pl. Exhibit 4 (Tr. 50-51), explaining his inability to send the money right away, Lipman & Esfeld sent loss payable clauses to Granning & Treece, Pl. Exhibit 17 (Tr. 59-60). In that connection, attention is invited to the fact that the American Discount Company had collected the $138.00 due on Policy No. TR 8629 (being the one sued on)

when its loan had been paid off in April, 1945. This amount was later turned over by the American Discount Company to Lipman & Esfeld early in June (Tr. 144).

Thus, we have a situation where after having knowledge of the removal of the property from the State of Washington, Lipman & Esfeld, as agent for the appellee, wrote demanding payment and actually received payment of a balance owing on the premium on this policy.

Where the insured demands and accepts payment of a premium after knowledge of circumstances which render the insurance void, it is estopped to take advantage of the provisions which nullifies the insurance.

> "It is well settled rule of law that an insurer which, with knowledge of fact entitling it to treat a policy as no longer in force receives and accepts a premium on the policy, it is estopped to take advantage of the forfeiture. It can not treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occuring, and at the same time treat it as valid for the purpose of earning and collecting further premiums."
>
> 29 Am. Jur., Page 653.
>
> "The acceptance of premiums by the insurer with knowledge of a breach of conditions or ground for forfeiture, ordinarily constitutes a waiver or estoppel."
>
> 45 C. J. S. Page 690.

The Supreme Court of the State of Washington quotes the above quoted rule with approval in the

case of *Millis v. Continental Life Ins. Co.,* 162 Wash. 555, 298 Pac. 739.

To the same effect are the following cases:

Staats v. Pioneer Ins. Association, 55 Wash. 51, 104 Pac. 185;

Neat v. U. S. Fidelity & Guaranty Co., 170 Wash. 625, 17 Pac. (2) 32;

Hedrick v. Washington National Insurance Company, 186 Wash. 263, 57 Pac. (2) 1038;

Neiman v. City of New York Insurance Company, 202 Iowa 1172, 211 N. W. 710.

Taylor v. National Union Fire Ins. Co., 140 Tenn. 150, 203 S. W. 830.

Block v. U. S. Fidelity & Guaranty Co., 316 Mo. 278, 290 S. W. 429.

Union Assur. Society v. Tolivar, (5th C. C. A.) 141 Fed. (2) 405.

Aside from the fact of having demanded and received payment of the balance of the premium, the agents of the appellee executed and sent to appellants, Granning and Treece, a loss payable clause knowing at the time that the property was out of the State. This clause was in response to a request from Granning & Treece: "In order that we may be fully protected." The sending of a loss payable clause under such circumstances without mentioning anything about coverage being limited to Washington, was so deceptive as to amount to fraud. Surely, on these facts alone, the appellee should be estopped to rely on the clause purporting to limit coverage to the State of Washington. The execution

and sending of the mortgagee clause coupled with a letter to appellant, Van Meter, advising of its execution and delivery was an affirmative act calculated to lead appellants into believing that the property was insured.

Then, again in August, 1945, there was an exchange of correspondence between appellant, Van Meter, and the appellee's agent, Pl. Exhibit 5, (Tr. 51-53). In order to understand the full import of the letter of August 17, 1945, plaintiff's exhibit 5, it must be considered in connection with plaintiff's exhibit 3, (Tr. 47-50) and plaintiff's exhibit 15 (Tr. 55-57). It will be observed that the statement accompanying the letter of May 1, 1945, Exhibit 3, refers to three policies. The letter of May 18, 1945, Exhibit 15, explains these policies. First, there was a fleet policy covering trucks. Second, there was a contractors equipment policy (being the one sued on) covering the International Tractor and Cargo Logging Arch. There was also insurance on a Buick Coupe.

The language of the letter of August 17, 1945, Pl. Exhibit 5, obviously was calculated to assure Van Meter that inasmuch as they had furnished loss payable clauses to Granning & Treece, they were certain that Granning & Treece had not written any insurance on the equipment that "we had previously insured." The plain inference from this

letter is that Van Meter was protected by the policy that had been issued by them.

Attention is also called to another circumstance present in this case. Condition No. 15 on the reverse side of the policy provides in part as follows:

> "15. CANCELLATION. This policy shall be cancelled at any time at the request of the assured; or by the Company by giving fifteen (15) days' notice of cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having actually been paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice, it shall retain only the pro rata premium."

It will be noted that this clause provides that if the policy becomes void or *"ceases"* the insured upon surrender of the policy is entitled to a return of the premium, less the customary short rate. On about April 20, 1945, there was a balance of about $138.00 owing on the premium on this policy. This balance was collected by the American Discount Company when its loan was paid off. (Tr. 144). In collecting this balance the American Discount Company was obviously acting for Lipman & Esfeld and the appellee insurance company. At the time it received that balance of the premium, it had before it appellant Van Meter's signed request (Tr. 64) accompanying the Granning & Treece letter of April 20, 1945, Def. Exhibit A-2, (Tr. 62-64) which reads in part:

> "If I am entitled to any refund for unearned interest or insurance premium, you may also return that direct to Granning & Treece."

Presumably this letter came to the attention of Sol Esfeld who was the manager of the American Discount Company. He was also an ostensible partner in the firm of Lipman & Esfeld and it appears from the testimony of Morton Pinch that in view of Mr. Esfeld's familiarity with the insurance business, they left to Mr. Esfeld the matter of arranging insurance in the name of Lipman & Esfeld in connection with loans financed by the American Discount Company. Mr. Esfeld with knowledge that the property had been moved or was about to be moved out of the State of Washington which would cause the insurance to cease, instead of cancelling the policy which he had in his possession and having Lipman & Esfeld return the unearned premium to Van Meter, sent the policy to Granning & Treece and turned the premium that had been collected over to Lipman & Esfeld.

Assuming that Mr. Esfeld had actual or ostensible authority to act for Lipman & Esfeld at that moment, it is clear that there was an election to treat the coverage as attaching to the property while located outside the State. Appellee will no doubt contend that Esfeld had no authority to act for Lipman & Esfeld. Appellants believe that evidence shows he had actual or apparent authority.

Regardless of whether he did have such author-

ity, the members of the firm of Lipman & Esfeld ratified his action by accepting the balance of the premium collected by the American Discount Company and issuing loss payable clause, with knowledeg of the fact that the policy had been delivered to Granning & Treece in Portland, Oregon, and that the property was outside the State.

Viewing these facts in their entirety, it is impossible to come to any other conclusion than that the appellee acting through its agents elected to treat the insurance on this tractor as being in full effect notwithstanding its removal out of the State. The rule applicable to this situation is clearly stated by the Supreme Court of Washington in the following unequivocal language:

> "The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estops the insured from relying thereon as a defense to an action on the policy."
>
> *Reynolds v. Travelers Ins. Co.,* 176 Wash. 36, 46, 28 Pac. (2) 310.

The rule announced above is applicable to the facts of this case. We have not merely one act, but a whole series of acts, all of which lulled Van Meter into the belief that the property was protected

against fire and other hazards. Would not any reasonable person in Van Meter's situation have been led to believe that he was protected? It is submitted that the facts show an implied waiver of this restriction on the property's location in Washington and that the insurance company should be estopped to rely on it.

4. The Decision of the Ninth Circuit Court of Appeals In the Case of *Fidelity & Guaranty Fire Corp. v. Bilquist,* 99 Fed. (2) 333, 108 Fed. (2) 713, Is Not Decisive of the Issues In This Case.

The trial judge seemingly based his conclusion in this case on the holding of this Court in the case of *Fidelity & Guaranty Fire Corp. v. Bilquist,* 99 Fed. (2) 333, 108 Fed. (2) 713.

That case was before this Court on two occasions. The first appeal was from a judgment in favor of the insured. The policy provided that the building would be insured "while occupied only for dwelling house purposes" and the furniture "only while contained in the above described dwelling house building." On the first appeal the Court held that the restrictions mentioned were not merely conditions, but were restrictions on coverage and that recovery could be had only by first having the policy reformed. In commenting on the facts indicated by the record on the first appeal, the Court said:

> "We think the proof as it now stands discloses that the parties intended to obtain insurance

> which would cover the loss. Langer so intended, as shown by the fact that he was protecting the bank's interest as mortgagee. Under the Washington cases above cited, his intention was imputed to appellant. It is conceded that Langer had authority to issue a policy covering the loss. By mistake such policy was not issued, but one was issued which did not conform to the intention of the parties. Under this evidence, we see no reason why reformation should not be granted." (99 Fed. (2) 335).

The case was remanded to the lower Court to permit amendment to the pleadings and to dispose of it on the theory of reformation.

> *Fidelity & Guaranty Fire Corp. v. Bilquist,* 99 F. (2) 333.

Upon a retrial of the case, judgment was rendered in favor of the insured, the trial Court having found facts entitling the insured to a reformation. In the statement of facts on the second appeal, we find that the facts stated in the opinion to be somewhat similar, but in the opinion on the second appeal, the Court recites the following additional facts:

> "The policy was plainly marked "dwelling" in bold print on the outside and the word "dwelling" was used many times in both the policy and the application in such a manner as to inform the casual reader that both instruments referred only to dwelling. The policy was shown to Myhre by Langer at the Bank. Myhre saw that Bilquist's name appeared as owner and told Langer to "change it so my name was on it." No other examination or objection was made. Langer took care of this by writing in Myhre's name as third mortgagee." (108 Fed. (2) 714).

Further along in the opinion on the same page, the Court referring to the facts states:

> "In regard to the term of the policy and the premium paid, Myhre testified as follows: " . . . . when I discovered the premium was only $77.00, I made no inquiry as to how long the policy ran. If I had supposed it was a three-year policy, it would have struck me as pretty peculiar. When I saw Exhibit 2, I was under the impression in a way that it was a one-year policy. I thought the rate was awfully cheap."

The facts referred to above were apparently not before the Court on the first appeal and the Court held that the insured was not entitled to reformation.

> *Fidelity & Guaranty Fire Corp. v. Bilquist,* 108 F(2) 713.

Thus, it appears in that case that one of the insured actually saw and inspected the policy. He made a suggestion for correction. The word "dwelling" was marked in bold type and appeared many times in the policy. Furthermore, it appears that the insured knew what the premium was and that he thought the rate was awfully cheap. In the concluding paragraph of the opinion, it appears that the rate on the building used as a tavern was five times the rate used as a dwelling. It is obvious that the facts in that case do not parallel those involved here, because in the instant case appellant, Van Meter, never saw the policy and there is nothing to indicate that the rate would have any material

difference had the restriction in question not been included.

As to the Court's conclusion in the Bilquist case, that recovery could not be had without reformation, it does not follow that the clause in the instant case cannot be waived or the insurance company estopped to assert it. It appears from that facts in the Bilquist case that if the building was insured for a tavern, the premium rate and presumably the risk would be very much greater. The use to which the building was put obviously effected the risk considerably and might properly be held to be a condition effecting the coverage. In the instant case in view of the fact that the property, under the policy as written, would be covered anywhere within the broad limits of the State of Washington, it seems clear that the exact location was not one of the factors entering prominently into the calculation of the risk.

Except in situations where location is of the essence of the risk, appellants submit that the authorities are almost universally to the effect that the matter of location may be the subject of waiver or estoppel. The Supreme Court of the State of Washington has definitely committed itself to the rule that in fire insurance policies the matter of location may be waived or the insurance company estopped to rely on it.

Reynolds v. Canton Ins. Office, 98 Wash. 425, 167 Pac. 1115.

Henslin v. U. S. Fire Ins. Co., 152 Wash. 637, 278 Pac. 702.

It is submitted that a careful study of the decision of this Court in the Bilquist case in the light of the above mentioned decisions of the Supreme Court of Washington justifies the appellants' position that the trial court was in error in concluding that this Court's decision in the Bilquist case was decisive of the issues in this case.

5. The Court Erred In Sustaining Challenge to Sufficiency of Appellants' case and Denying Motion for New Trial.

Assignment of errors No . 5 and No. 6 are involved in the disposition of the issues argued in the foregoing portions of this brief.

This is an appeal from a judgment of dismissal following the appellee's motion to dismiss on the grounds that the evidence introduced by the appellants showed no right to relief against the respondent. On this appeal, the appellants are entitled to have the evidence and all inferences reasonably to be drawn therefrom viewed in the light most favorable to the appellants.

Federal Deposit Insurance Company v. Mason, 115 Fed. (2) 548.

Viewing the facts as a whole, appellants respectfully urge that there is a combination of facts pres-

ent in this case which entitled them to recover from the appellee.

An insurance company deals through agents. Policies issued by the companies are generally very verbose and couched in language which even the most intelligent have difficulty in understanding. Clients of the insurance companies have grown to depend on the agent for information and advise as to the extent of the coverage. In this case it was agreed that a policy which would cover the appellants anywhere in the United States was to be issued and the later acts and conduct of the agents, Lipman & Esfeld, attest to the fact that that was their understanding. These facts entitle the appellants to reformation. Furthermore, the acts of the appellee's agent definitely show a waiver of the provisions purporting to limit coverage to the State of Washington and an election to treat the insurance as still covering the property.

Appellants respectively urge that the evidence entitled them to the relief prayed for and that the trial court erred in sustaining appellee's motion to dismiss and denying appellants' motion for a new trial.

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